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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 660**

**[Docket No. 171023999-8015-01]**

**RIN 0648-BH31**

**Magnuson-Stevens Act Provisions; Fisheries off West Coast States; Pacific Coast Groundfish Fishery; 2018 Tribal Fishery for Pacific Whiting**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS issues this proposed rule for the 2018 Pacific whiting fishery under the authority of the Pacific Coast Groundfish Fishery Management Plan (FMP), the Magnuson Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), and the Pacific Whiting Act of 2006. This proposed rule would allocate 17.5 percent of the U.S. Total Allowable Catch (TAC) of Pacific whiting for 2018 to Pacific Coast Indian tribes that have a Treaty right to harvest groundfish.

**DATES:** Comments on this proposed rule must be received no later than *[Insert date 30 days after date of publication in the FEDERAL REGISTER]*.

**ADDRESSES:** You may submit comments on this document, identified by NOAA-NMFS-2017-0160, by any of the following methods:

- Electronic Submission: Submit all electronic public comments via the Federal eRulemaking Portal. Go to [www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2017-0160](http://www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2017-0160), click the "Comment Now!" icon, complete the required fields, and enter or attach your comments.

- Mail: Barry A. Thom., Regional Administrator, West Coast Region, NMFS, 7600 Sand Point Way NE, Seattle, WA 98115-0070, Attn: Frank Lockhart.

*Instructions:* Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are part of the public record and will generally be posted for public viewing on [www.regulations.gov](http://www.regulations.gov) without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous).

Additional background information and documents are available at the NMFS West Coast Region Web site at [http://www.westcoast.fisheries.noaa.gov/fisheries/management/whiting/pacific\\_whiting.html](http://www.westcoast.fisheries.noaa.gov/fisheries/management/whiting/pacific_whiting.html) and at the Pacific Fishery Management

Council's website at <http://www.pcouncil.org/>. Comments from the public may be viewed on Regulations.gov.

**FOR FURTHER INFORMATION CONTACT:** Frank Lockhart, phone: 206-526-6142, and e-mail: [Frank.Lockhart@noaa.gov](mailto:Frank.Lockhart@noaa.gov).

**SUPPLEMENTARY INFORMATION:**

**Background**

The regulations at 50 CFR 660.50(d) outline the procedures for implementing the treaty rights that Pacific Coast treaty Indian tribes have to harvest groundfish in their usual and accustomed fishing areas in U.S. waters. Section 660.50(d) establishes the process by which the tribes with treaty fishing rights in the area covered by the FMP request allocations, set-asides, or regulations specific to the tribes, in writing, during the biennial harvest specifications and management measures process. The regulations state that the Secretary will develop tribal allocations and regulations in consultation with the affected tribe(s) and, insofar as possible, with tribal consensus. The procedures NMFS employs in implementing tribal treaty rights under the FMP were designed to provide a framework process by which NMFS can accommodate tribal treaty rights by setting aside appropriate amounts of fish in conjunction with the Pacific Fishery Management Council process for determining harvest specifications and management measures.

Since the FMP has been in place, NMFS has been allocating a portion of the U.S. TAC (called Optimum Yield (OY) or Annual Catch Limit (ACL) prior to 2012) of Pacific whiting to the tribal fishery, following the process established in 50 CFR 660.50(d). The tribal allocation is subtracted from the U.S. Pacific whiting TAC before allocation to the non-tribal sectors.

There are four tribes that can participate in the tribal Pacific whiting fishery: the Hoh Tribe, the Makah Tribe, the Quileute Tribe and the Quinault Indian Nation (collectively, the "Treaty Tribes"). The Hoh Tribe has not expressed an interest in participating to date. The Quileute Tribe and Quinault Indian Nation have expressed interest in commencing participation in the Pacific whiting fishery. However, to date, only the Makah Tribe has prosecuted a tribal fishery for Pacific whiting. They have harvested Pacific whiting since 1996 using midwater trawl gear. Tribal allocations have been based on discussions with the Tribes regarding their intent for those fishing years. Table 1 below provides a history of U.S. TACs and annual tribal allocation in metric tons (mt).

**Table 1. U.S. Total Allowable Catch and Annual Tribal Allocation in Metric Tons (mt)**

<u>Year</u>	<u>U.S. TAC <sup>1/</sup></u>	<u>Tribal Allocation</u>
2007	242,591 mt	35,000 mt
2008	269,545 mt	35,000 mt

2009	135,939 mt	50,000 mt
2010	193,935 mt	49,939 mt
2011	290,903 mt	66,908 mt
2012	186,037 mt	48,556 mt
2013	269,745 mt	63,205 mt
2014	316,206 mt	55,336 mt
2015	325,072 mt	56,888 mt
2016	367,553 mt	64,322 mt
2017	441,433 mt	77,251 mt

/1 Beginning in 2012, the United States started using the term Total Allowable Catch, or TAC, based on the Agreement between the Government of the United States of America and the Government of Canada on Pacific Hake/Whiting. Prior to 2012, the terms Optimal Yield (OY) and Annual Catch Limit (ACL) were used.

In 2009, NMFS, the states of Washington and Oregon, and the Treaty Tribes started a process to determine the long-term tribal allocation for Pacific whiting; however, no long-term allocation has been determined. In order to ensure Treaty Tribes continue to receive allocations, this rule proposes the 2018 tribal allocation of Pacific whiting. This allocation is not intended to set precedent for allocations in future years.

#### **Tribal Allocation for 2018**

In exchanges between NMFS and the Treaty Tribes during 2017, the Makah Tribe indicated their intent to participate in the tribal Pacific whiting fishery in 2018, and requested 17.5 percent of the U.S. TAC. The Quinault Indian Nation informed the

Region that they will not participate in the 2018 fishery. Quileute Indian Tribe has not responded to inquiries about their whiting fishing intent for 2018, and has not pursued a whiting fishery to date. The Hoh Indian Tribe has in previous years indicated in conversation with Frank Lockhart, Groundfish & Coastal Pelagic Species Senior Policy Advisor at NMFS, that they have no plans to fish for whiting in the foreseeable future and will contact NMFS if that changes. NMFS will again contact the tribes during the proposed rule comment period to refine, if necessary, the 2017 allocation before a final decision is made. NMFS proposes a tribal allocation that accommodates the Makah request, specifically 17.5 percent of the U.S. TAC. NMFS believes that the current scientific information regarding the distribution and abundance of the coastal Pacific whiting stock suggests that the 17.5 percent is within the range of the tribal treaty right to Pacific whiting.

The Joint Management Committee, which was established pursuant to the Agreement between the United States and Canada on Pacific Hake/Whiting (the Agreement), is anticipated to recommend the coastwide and corresponding U.S./Canada TACs no later than March 25, 2018. The U.S. TAC is 73.88 percent of the coastwide TAC. Until this TAC is set, NMFS cannot propose a specific amount for the tribal allocation. The Pacific whiting fishery typically begins in May, and the final rule establishing

the Pacific whiting specifications for 2018 is anticipated to be published by early May. Therefore, in order to provide for public input on the tribal allocation, NMFS is issuing this proposed rule without the final 2018 TAC. However, to provide a basis for public input, NMFS is describing a range of potential tribal allocations in this proposed rule, applying the proposed approach to determining the tribal allocation to a range of potential TACs derived from past harvest levels.

In order to project a range of potential tribal allocations for 2018, NMFS is applying its proposed approach to determining the tribal allocation to the range of U.S. TACs over the last 10 years, 2008 through 2017 (plus or minus 25 percent to capture variability in stock abundance). The range of U.S. TACs in that time period was 135,939 mt (2009) to 441,433 mt (2017). Applying the 25 percent variability results in a range of potential TACs of 101,954 mt to 551,791 mt for 2018. Therefore, using the proposed allocation rate of 17.5 percent, the potential range of the tribal allocation for 2018 would be between 17,842 and 96,563 mt.

This proposed rule would be implemented under authority of section 305(d) of the Magnuson-Stevens Act, which gives the Secretary responsibility to "carry out any fishery management plan or amendment approved or prepared by him, in accordance with the provisions of this Act." With this proposed rule, NMFS,

acting on behalf of the Secretary, would ensure that the FMP is implemented in a manner consistent with treaty rights of four Treaty Tribes to fish in their "usual and accustomed grounds and stations" in common with non-tribal citizens. *United States v. Washington*, 384 F. Supp. 313 (W.D. 1974).

### **Classification**

NMFS has preliminarily determined that the management measures for the 2018 Pacific whiting tribal fishery are consistent with the national standards of the Magnuson-Stevens Act and other applicable laws. In making the final determination, NMFS will take into account the data, views, and comments received during the comment period.

The Office of Management and Budget has determined that this proposed rule is not significant for purposes of Executive Order 12866. This proposed rule is not expected to be an Executive Order 13771 regulatory action because this proposed rule is not significant under Executive Order 12866.

As required by section 603 of the Regulatory Flexibility Act (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was prepared. The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A summary of the analysis follows. A copy of this analysis is available from NMFS.



Under the RFA, the term "small entities" includes small businesses, small organizations, and small governmental jurisdictions. A small organization is any nonprofit enterprise that is independently owned and operated and is not dominant in its field. Small governmental jurisdictions such as governments of cities, counties, towns, townships, villages, school districts, or special districts are considered small jurisdictions if their populations are less than 50,000. The Small Business Administration has established size criteria for entities involved in the fishing industry that qualify as small businesses. A business involved in fish harvesting is a small business if it is independently owned and operated and not dominant in its field of operation (including its affiliates) and if it has combined annual receipts, not in excess of \$11 million for all its affiliated operations worldwide (see 80 FR 81194, December 29, 2015). A wholesale business servicing the fishing industry is a small business if it employs 100 or fewer persons on a full time, part time, temporary, or other basis, at all its affiliated operations worldwide. A seafood processor is a small business if it is independently owned and operated, not dominant in its field of operation, and employs 750 or fewer persons on a full time, part time, temporary, or other basis, at all its affiliated operations worldwide. For purposes of rulemaking, NMFS is also applying the seafood processor standard

to catcher processors because Pacific whiting Catcher-Processors (C/Ps) earn the majority of the revenue from processed seafood product.

This proposed rule would affect how Pacific whiting is allocated to the following sectors/programs: Tribal, Shorebased Individual Fishing Quota (IFQ) Program Trawl Fishery, Mothership (MS) Coop Program-Whiting At-sea Trawl Fishery, and C/P Coop Program-Whiting At-sea Trawl Fishery. The amount of Pacific whiting allocated to these sectors is based on the U.S. TAC.

Currently, the Shorebased IFQ Program is composed of 180 Quota Share permits/accounts, 154 vessel accounts, and 47 first receivers, only a portion of which participate in the Pacific whiting fishery, listed below. These regulations also directly affect participants in the MS Coop Program, a general term to describe the limited access program that applies to eligible harvesters and processors in the MS sector of the Pacific whiting at-sea trawl fishery. This program currently consists of six MS processor permits, and a catcher vessel fleet currently composed of a single coop, with 34 Mothership/Catcher Vessel (MS/CV) endorsed permits (with three permits each having two catch history assignments). These regulations also directly affect the C/P Coop Program, composed of 10 C/P endorsed permits owned by three companies that have formed a single coop. These co-ops are considered large entities from several perspectives;

they have participants that are large entities, and have in total more than 750 employees worldwide including affiliates. Although there are three non-tribal sectors, many companies participate in two sectors and some participate in all three sectors. As part of the permit application processes for the non-tribal fisheries, based on a review of the Small Business Administration size criteria, permit applicants are asked if they considered themselves a "small" business, and they are asked to provide detailed ownership information. After accounting for cross participation, multiple QS account holders, and affiliation through ownership, NMFS estimates that there are 103 non-tribal entities directly affected by these proposed regulations, 89 of which are considered "small" businesses. We also expect one tribal entity to fish in 2018. Tribes are not considered small entities for the purposes of RFA.

This rule will allocate fish between tribal and non-tribal harvesters (a mixture of small and large businesses). Tribal fisheries consist of a mixture of fishing activities that are similar to the activities that non-tribal fisheries undertake. Tribal harvests are delivered to both shoreside plants and motherships for processing. These processing facilities also process fish harvested by non-tribal fisheries. The effect of the tribal allocation on non-tribal fisheries will depend on the level of tribal harvests relative to their allocation and the

reapportionment process. If the tribes do not harvest their entire allocation, there are opportunities during the year to reapportion unharvested tribal amounts to the non-tribal fleets. For example, in 2017 NMFS reapportioned 41,000 mt of the original 77,251 mt tribal allocation. This reapportionment was based on conversations with the tribes and the best information available at the time, which indicated that this amount would not limit tribal harvest opportunities for the remainder of the year. In 2017, the tribal Pacific whiting catch was approximately 6,000 mt in a fishery that spanned early August to December and delivered to a shoreside processing plant. This reapportioning process allows unharvested tribal allocations of Pacific whiting to be fished by the non-tribal fleets, benefitting both large and small entities. The revised Pacific whiting allocations for 2017 following the reapportionment were: Tribal 36,251 mt, C/P Coop 137,252 mt; MS Coop 96,884 mt; and Shorebased IFQ Program 169,547 mt.

The prices for Pacific whiting are largely determined by the world market because most of the Pacific whiting harvested in the U.S. is exported. The U.S. Pacific whiting TAC is highly variable, as have subsequent harvests and ex-vessel revenues. For the years 2011 to 2016, the total Pacific whiting fishery (tribal and non-tribal) averaged harvests of approximately 292,000 mt annually. As of October 23, 2017, the U.S. fishery

had an unprecedentedly high catch of almost 320,000 mt from the all-time high TAC of 441,433 mt.

In 2015, the MS whiting fleet had \$6.8 million in revenue, generated \$19.1 million in income, and supported 461 jobs on the West Coast. The C/P fleet generated \$7.1 million in revenue, driving \$88.8 million in income and supporting 1,670 jobs. However, in 2015, bycatch constraints, anomalous ocean conditions, and a Russian import ban contributed to atypically low harvests and revenues and a historic low attainment of a high TAC. With similarly high (and increasing) TACs, attainment remained at average levels in 2014, 2016, and 2017. Thus, economic results from the 2015 season, the last year for which detailed economic data are available, are not a reasonable forecast of the 2018 season.

Until 2016 economic data are available, this makes the 2014 season the last representative year for which detailed economic information is available. In 2014, the MS fleet had \$46.4 million in wholesale revenue, and generated \$42 million in income and supported 926 jobs on the west coast from Pacific whiting (2014 Economic Data Collection (EDC) Mothership Report). The C/P fleet, which had \$99.2 million in wholesale revenue in 2014, generated \$142 million in income and supported 1,895 jobs on the west coast from Pacific whiting (2014 Economic Data Collection (EDC) C/P Report). In 2014, eight shoreside Pacific

whiting companies processed 61,000 mt of Pacific whiting, for a wholesale revenue of \$71 million. The number of companies processing shoreside did not change in 2015.

Impacts to Makah catcher vessels who elect to participate in the tribal fishery are measured with an estimate of ex-vessel revenue. In lieu of more complete information on tribal deliveries, total ex-vessel revenue is estimated with the 2016 average IFQ ex-vessel price of Pacific whiting, which was \$165 per mt. At that price, the proposed 2018 Tribal allocation (potentially 17,842 - 96,563 mt) would have an ex-vessel value between \$2.9 million and \$15.9 million.

NMFS considered two alternatives for this action: the "No-Action" and the "Proposed Action." NMFS did not consider a broader range of alternatives to the proposed allocation because the tribal allocation is based primarily on the requests of the tribes, and these requests reflect the level of participation in the fishery that will allow them to exercise their treaty right to fish for Pacific whiting. Consideration of a percentage lower than the tribal request of 17.5 percent is not appropriate in this instance. As a matter of policy, NMFS has historically supported the harvest levels requested by the tribes. Based on the information available to NMFS, the tribal request is within their tribal treaty rights. A higher percentage would arguably

also be within the scope of the treaty right. However, a higher percentage would unnecessarily limit the non-tribal fishery.

Under the Proposed Action alternative, NMFS proposes to set the tribal allocation percentage at 17.5 percent, as requested by the tribes. This would yield a tribal allocation of between 17,842 and 96,563 mt for 2018.

Under the no-action alternative, NMFS would not make an allocation to the tribal sector. This alternative was considered, but the regulatory framework provides for a tribal allocation on an annual basis only. Therefore, the no-action alternative would result in no allocation of Pacific whiting to the tribal sector in 2018, which would be inconsistent with NMFS' responsibility to manage the fishery consistent with the tribes' treaty rights. Given that there is a tribal request for allocation in 2018, this alternative received no further consideration.

NMFS believes this proposed rule would not adversely affect small entities. The reapportioning process allows unharvested tribal allocations of Pacific whiting, fished by small entities, to be fished by the non-tribal fleets, benefitting both large and small entities. NMFS has prepared an IRFA and is requesting comments on this conclusion. See **ADDRESSES**.

There are no reporting, recordkeeping or other compliance requirements in the proposed rule.

No Federal rules have been identified that duplicate, overlap, or conflict with this action.

Pursuant to Executive Order 13175, this proposed rule was developed after meaningful consultation and collaboration with tribal officials from the area covered by the FMP. Consistent with the Magnuson-Stevens Act at 16 U.S.C. 1852(b)(5), one of the voting members of the Pacific Council is a representative of an Indian tribe with federally recognized fishing rights from the area of the Council's jurisdiction. In addition, NMFS has coordinated specifically with the tribes interested in the Pacific whiting fishery regarding the issues addressed by this rule.

**List of Subjects in 50 CFR Part 660**

Fisheries, Fishing, Indian fisheries.

Dated: January 18, 2018.

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Samuel D. Rauch, III,  
Deputy Assistant Administrator for Regulatory Programs,  
National Marine Fisheries Service.



For the reasons set out in the preamble, 50 CFR part 660 is proposed to be amended as follows:

**PART 660--FISHERIES OFF WEST COAST STATES**

1. The authority citation for part 660 continues to read as follows:

**Authority:** 16 U.S.C. 1801 *et seq.* and 16 U.S.C. 773 *et seq.*, and 16 U.S.C. 7001 *et seq.*

2. In § 660.50, revise paragraph (f)(4) to read as follows:

**§ 660.50 Pacific Coast treaty Indian fisheries.**

\* \* \* \* \*

(f)\* \* \*

(4) *Pacific whiting*. The tribal allocation for 2018 will be 17.5 percent of the U.S. TAC.

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[FR Doc. 2018-01182 Filed: 1/23/2018 8:45 am; Publication Date: 1/24/2018]